

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT GARDYN	:	DETERMINATION
	:	DTA NO. 810548
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Years 1983 through 1985.	:	

Petitioner, Robert Gardyn, 50 Wilson Terrace, Staten Island, New York 10304, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1983 through 1985.

On December 18, 1992 and December 31, 1992, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), consented to have the controversy determined on submission without hearing. On February 3, 1993, the Division of Taxation submitted documentary evidence. The due date for petitioner's documents and brief was March 1, 1993. The Division of Taxation submitted a letter in support of its position on May 11, 1993. Petitioner submitted no evidence or brief in support of his position.¹ After due consideration of the record, Timothy J. Alston,

Administrative Law Judge, renders the following determination.

ISSUE

¹On July 26, 1993, petitioner, appearing by Peter A. Karl, III, Esq., submitted photocopies of New York State and Federal income tax returns for the years 1989, 1990 and 1991. These documents are not considered part of the record herein because: (1) they are irrelevant and (2) they were submitted in an untimely manner.

Whether notices of deficiency should be sustained where petitioner failed to present any evidence to show that such notices were, in any way, erroneous.

FINDINGS OF FACT

On November 24, 1989, the Division of Taxation ("Division") issued to petitioner, Robert Gardyn, three notices of deficiency which asserted additional New York State and New York City personal income tax for the years 1983, 1984 and 1985, respectively, in amounts as follows:

	<u>1983</u>	<u>1984</u>	<u>1985</u>
NYS	\$ 8,598.00	\$ 8,598.00	\$ 8,469.38
NYC	2,951.41	2,817.26	2,680.95
Total	\$11,549.41	\$11,415.26	\$11,150.33

The notices also asserted penalty pursuant to Tax Law § 685(a)(1), (b)(1) and (b)(2), plus interest.

Pursuant to statements of audit changes dated October 5, 1989, the Division set forth its computations regarding the proposed deficiencies. Specifically, the statements of audit changes indicate total income for each of the years at issue of \$75,000.00. From this amount, the Division allowed a standard deduction of \$2,500.00 and an exemption of \$800.00 (\$850.00 for 1985) to reach taxable income of \$71,700.00 (\$71,650.00 for 1985).²

The Division determined the additional tax due herein for each of the years at issue as set forth in the notices based on taxable income of \$71,700.00 (\$71,650.00 for 1985). Each of the statements of audit changes also stated the following:

"SINCE YOU FAILED TO REPLY TO OUR PREVIOUS LETTERS, WE HAVE ESTIMATED YOUR N.Y. STATE INCOME TAX BASED ON INFORMATION AVAILABLE."

The notices of deficiency herein were issued pursuant to a Division program focusing on taxpayers who filed Form IT-370, Application for Automatic Extension of Time to File, but who did not subsequently file personal income tax returns as required by law.

²The Division determined a filing status of "single" for petitioner.

Petitioner did not file New York State or City personal income tax returns for the years at issue. Petitioner did file Form IT-370 for each of the years at issue. Consequently, the Division made two attempts to contact petitioner by letter. Petitioner did not respond to the Division's letters. The Division then reviewed its files to determine whether petitioner had filed Federal income tax returns for the years at issue. This review indicated that no such returns had been filed. The Division then estimated petitioner's total income for each of the years at issue based upon a review of its records which indicated that petitioner had made estimated tax payments of \$11,000.00 for the year 1987. Of this amount, the Division had credited \$8,250.00 to State income tax and \$2,750.00 to City income tax. For purposes of the income estimate, the \$8,250.00 figure was rounded to \$8,500.00. Based upon the applicable rates of taxation, this \$8,500.00 was used to "back into" a taxable income amount of \$71,000.00 and, after adding back a standard deduction of \$2,500.00 and a single exemption of \$800.00, a total income figure of \$74,300.00, subsequently rounded to \$75,000.00, was derived. This \$75,000.00 figure was then used as the starting point to calculate the deficiencies herein.

The Division introduced into the record herein an affidavit made by Raymond Szmyr, a Division employee. In his affidavit, Mr. Szmyr explained, as has been noted above, that the notices of deficiency at issue resulted from a Division audit program which focused on individuals who had filed applications for automatic extensions of time to file returns, but who did not subsequently file such returns. The affidavit further stated:

"One of the [Division's] primary aims in initiating this audit program was to prompt taxpayers to file complete and accurate personal income tax returns for the particular year(s) so that an accurate income tax liability figure could be computed. While in some cases persons who filed only a Form IT-370 paid estimated income taxes, it is our experience that the estimated tax payments are often lower than the taxpayer's actual income tax liability. In cases such as this one where the taxpayer failed or refused to cooperate in filing a return or providing information shedding light on the amount of his or her income, we were forced to estimate the amount of tax due. Since our primary goal was to secure an accurate return from the taxpayer so as to make an accurate calculation of tax liability, it was important in doing the estimate not to underestimate that taxpayer's income tax liability. In the event that the taxpayer's liability was underestimated, much of the incentive for the taxpayer to file an accurate income tax return, which is essential to an accurate computation of a taxpayer's liability, could be removed."

The Szmyr affidavit also stated the following:

"Following the issuance of the Notice of Deficiency, the [Division] found that this taxpayer had made estimated payments totalling \$15,000 for the years 1983 through 1985. The taxpayer has been given credit for these estimated tax payments as indicated by the Conciliation Order and the attached letter to the taxpayer dated September 18, 1990.

"While the Division of Taxation is willing to recompute the taxpayer's tax liability when he files complete and accurate personal income tax returns, it has not changed the income estimate of \$75,000 since as the [sic] date of this affidavit the taxpayer has submitted no information whatsoever which indicates that this estimate of income is excessive."

The Division credited the asserted deficiencies by applying petitioner's estimated payments for the years at issue (referred to above) as follows:

	<u>1983</u>		<u>1984</u>		<u>1985</u>		
	<u>NYS</u>	<u>NYC</u>	<u>NYS</u>	<u>NYC</u>	<u>NYS</u>	<u>NYC</u>	
Tax Due per Notices		\$8,598.00		\$2,951.41		\$8,598.00	\$2,817.26
Estimated Tax Payments		<u>-3,000.00</u>		<u>-1,000.00</u>		<u>-5,000.00</u>	<u>-0-4,500.00</u>
Tax Due		\$5,598.00		\$1,951.41		\$3,598.00	\$2,817.26
							\$8,469.38
							\$2,680.95
							\$1,180.95

By Conciliation Order, dated November 29, 1991, the Bureau of Conciliation and Mediation Services sustained the notices of deficiency herein. The order further noted the \$15,000.00 in estimated payments which had been applied to the alleged deficiencies.

In his petition, petitioner contended that the deficiencies asserted by the Division were "based on fictitious substituted tax returns arbitrarily created" by the Division and that the deficiency was not "realistic or appropriate." Petitioner submitted no evidence to support this contention.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 681(a), where, as here, a taxpayer fails to file income tax returns as required under Article 22, the Division is "authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer." Tax Law § 689(e) places the burden of proof upon petitioner to establish error in the Division's assessment.

B. While such an assessment of tax must have a rational basis (see, Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889, 892), the Division does not have an affirmative burden to establish the rational basis for its assessment (see, Matter of Metzger, Tax Appeals Tribunal,

February 11, 1993). Rather, a presumption of correctness attaches to an assessment issued by the Division which, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied 81 NY2d 704, 595 NYS2d 398; see, Matter of Tivolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174).

C. Here, petitioner has submitted no evidence challenging the statutory notices.

Accordingly, pursuant to the foregoing discussion, such notices must be sustained.

D. The petition of Robert Gardyn is in all respects denied and the notices of deficiency dated November 24, 1989, as modified by the Conciliation Order dated November 29, 1991, are sustained.

DATED: Troy, New York
September 16, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE